Supreme Court, U.S.
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No. 92-1018

In The

Supreme Court of the United States

October Term, 1992

MARY H. ESPOSITO, WARDEN,

Petitioner

v.

JAMES K. HOUSTON,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

James K. Houston, Respondent, hereby respectfully moves for leave to proceed in forma pauperis in this case. Respondent's motion to so proceed in the United States District Court, Northern District of Georgia, was granted on June 19, 1990. On June 21, 1991, pursuant to the Criminal Justice Act, 18 U.S.C. §3006(A) the Court of Appeals, Eleventh Circuit, appointed William D. Ferguson as counsel for Respondent.

Respectfully submitted,

William D. Ferguson

William D. Ferguson
Emory University School of Law
Atlanta, Georgia 30322
(404) 727-6837
Counsel for Respondent

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RESPONDENT'S BRIEF IN OPPOSITION

William D. Ferguson
Counsel for Respondent

Please serve:

William D. Ferguson
Emory University School of Law
Atlanta, Georgia 30322
(404) 727-6837

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, James K. Houston, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's opinion in this case. The opinion is set forth at App. 1 of the Petition herein.

REASONS WHY THE PETITION SHOULD BE DENIED.

1. **Petitioner misstates and misunderstands Respondent's claim and the Court of Appeals holding.**

Contrary to the consistent argument of Petitioner, reiterated below and here and in Questions I and IV of the Petition, this case does not involve the retroactive application of Batson v. Kentucky, 476 U.S. 79 (1986). The Per Curiam opinion of the court below found that "The state clearly misunderstands" Respondent's argument. (App. 6.)

This case involves the issue of ineffective assistance of counsel on appeal which denied Respondent his constitutional right to adequate legal representation. The court below properly and correctly analyzed the case and applied the rules announced by this Court in Strickland v. Washington, 466 U.S. 668 (1986).

2. **There is no substantial issue concerning appellate counsel's inadequate representation.**

During the trial of this case, defense counsel moved for a mistrial based upon the prosecutor's racially motivated discriminatory exercise of peremptory strikes to remove six black males from the jury. Respondent is a black male. The prosecutor candidly stated that he did not strike them "because they were black or because they were male but because they were both black and male . . . ." The record reveals a statement by defense counsel that the issue of racially motivated peremptory challenges was then pending before this Court, though he did not identify the case or cases to which he was referring.

On appeal to the Georgia Supreme Court, Respondent's counsel raised only two issues: insufficiency of the evidence and failure to give a charge requiring close scrutiny of a confession. Uncontroverted evidence showed that Respondent shot the victim in the back of the head and there was evidence to support a finding that he did so out of jealousy or anger. Respondent claimed he shot her in self defense. The court dismissed the first alleged error in one short paragraph of its one page opinion. The other

error was disposed of in two short paragraphs on the ground there was no confession. The errors enumerated by appellate counsel can be accurately characterized as lacking merit and bordering on the frivolous. The trial court's denial of the motion for mistrial based upon the prosecutor's discriminatory exercise of peremptory challenges--the only truly viable and meritorious error--was not enumerated.

At the time of the appeal, counsel reasonably knew or should have known of the cases of Strauder v. West Virginia, 100 U.S. 303 (1880) and McCray v. New York, 461 U.S. 961 (1983). Strauder held unconstitutional the state's purposeful exclusion of members of the defendant's race (black) from the jury. The prosecution here admitted to purposefully excluding males who were black from the jury. In McCray five members of this Court agreed that a serious constitutional issue was raised by such discriminatory use of peremptory strikes and that Swain v. Alabama was due for reconsideration. The justices invited counsel to argue the issue in the lower courts that this court might gather more views. Appellate counsel erroneously declined that invitation and failed to preserve Respondent's right to do so. Based on the foregoing, the Court of Appeals properly found that a reasonably competent attorney should have raised that issue on appeal. The decision is in accord with, and not contrary to, Evitts v. Lucey, 469 U.S. 387 (1985) and Jones v. Barnes, 463 U.S. 745 (1983), neither of which approve failure to raise the only available meritorious claim.

In Strickland, supra, holding that the defendant must show his

representation "fell below an objective standard of reasonableness", Justice O'Connor stated that "no more specific guidelines are appropriate." 466 U.S. at 688. The Court recognized, as did the Court of Appeals in this case, that whether counsel's conduct complied with professional standards involves primarily factual questions of the conduct and the prevailing professional norms in light of the situation before the court. Specific guidelines are not appropriate and application is properly left to the lower courts.

This issue does not warrant expenditure of the scarce resources of this Court.

3. **Appellate counsel's error was prejudicial to Respondent.**

Although Petitioner and the court below spoke in terms of prejudice, it should be borne in mind that prejudice in these cases exists whenever counsel's unprofessional conduct undermines confidence in the outcome of the proceeding. Strickland, 466 U.S. at 694. Prejudice to Respondent is clear in this case.

Whether the Georgia Supreme Court would have reversed the conviction had the issue been raised is problematical inasmuch as the court had recently rejected the argument. Perhaps a Strauder argument would have swung the balance, especially with the purposeful discrimination so clearly demonstrated on the record in this case. Counsel's failure to enumerate, brief and argue this error precluded any determination by the Georgia court.

More importantly, counsel's failure to raise the issue before

the Georgia Supreme Court constituted an absolute bar of Respondent's opportunity to petition this Court for a writ of certiorari. This failure denied the Respondent an opportunity to seek to overturn the conviction which resulted from an unfair trial before a discriminatorily selected jury in violation of Respondent's equal protection rights. Loss of a constitutional right is patently prejudicial. The Eleventh Circuit found that Respondent was actually prejudiced by the loss of the opportunity.

Petitioner charges the court below with "sheer speculation" and complains that the court did not "identify who would have filed this certiorari petition." The state's failure to fulfill its constitutional obligation to provide effective assistance of counsel deprives us of the ability to identify who would have filed the petition. However, the federal courts have first hand knowledge of and experience with public defenders and pro bono attorneys who file certiorari petitions for indigent defendants. Those courts also have considerable experience with prisoners who file pro se petitions. Respondent has demonstrated his own ability to proceed pro se as he did in initiating the petition for the habeas writ in this case. Counsel's error precluded either Respondent or a pro bono attorney or public defender from filing the petition.

Were the Court to conclude that failure of counsel to raise this issue and preserve the opportunity to seek review in this Court did not constitute prejudice, the Court would substantially erode any requirement of effective assistance of counsel on appeal.

Such a conclusion would authorize ineffective assistance of counsel at the expense of the accused's right to a fair trial before a properly selected jury.

It is at the certiorari petition stage that the Petitioner's misunderstanding comes to the fore. Contrary to the assertion of Petitioner, page 11, Respondent has never argued that the Georgia Supreme Court should "have held" or delayed acting upon Respondent's appeal to prevent it from becoming final before the Batson decision was rendered. In fact, there was no way for the court to even know about a certiorari petition by Batson because his petition was not in existence when Respondent's appeal was before the Georgia court. Batson's petition was dated February 19, 1985, five weeks after the Georgia Supreme Court affirmed Respondent's conviction. This attempt to confuse and misstate the issue should be recognized for what it is.

Petitioner's misunderstanding of the essential issue in this case is readily apparent. Petitioner repeatedly attempted to characterize the issue as involving retroactive application of Batson. Respondent does not seek retroactive application of the Batson case. Respondent has consistently argued and the Court of Appeals agreed that it is reasonably probable that this Court would have granted a writ of certiorari in this case and reversed the denial of the mistrial motion based upon the purposeful racial discrimination in the jury selection process. This court could have done so under Strauder v. West Virginia, supra, or upon reconsideration of Swain v. Alabama, 380 U.S. 202 (1965). If the

road to this Court had not been closed by counsel's failure, there is a reasonable probability we would have a Houston rule rather than a Batson rule.

The Eleventh Circuit found that Respondent was actually prejudiced by counsel's error because Respondent "has a valid Batson claim." (App. 6.) That manner of expression may have contributed to Petitioner's misstatement of the issue and misunderstanding of Respondent's argument. Of course, the term "Batson claim" is shorthand for a valid claim of discriminatory jury selection and denial of equal protection of the law. The court's statement does not mean Respondent is now asserting a Batson claim. It is properly read to mean that at the time the case would have been before this Court but for counsel's malperformance, he had a right to a reversal based upon the purposeful racial discrimination in the selection of his jury. Had the road to this Court not been barred, Respondent would not have asserted "a Batson claim" because there was no Batson rule. Rather the argument would have directly addressed the purposefully racially discriminatory jury selection procedure employed by the prosecutor in this case. Respondent's case was tried within a month of Batson's trial and was affirmed less than a month following the affirmance of Batson in state court. Respondent's timely petition for a writ of certiorari would have been filed before the petition by Batson or within forty eight days of the date of Batson's petition. Given the clarity of the record in this case and the stated purposeful nature of the discrimination, it is highly probable that this Court would have

granted Respondent's petition instead of, or in conjunction with, Batson's petition. Clearly, this Court would have reversed the conviction on the basis of the discriminatory jury selection.

Thus, it is highly probable that a different outcome would have obtained but for counsel's failure. That portion of the Strickland rule has been satisfied. Clearly, Respondent does not seek retroactive application of Batson but, instead, has established that his claim of a right to a mistrial based upon the unconstitutional jury selection process would have been upheld, producing a different outcome. The purposeful discrimination practiced by the prosecutor substantially undermines confidence in the outcome of this case.

4. **The decision of the court below is limited by and to the unique circumstances of this case.**

Petitioner continues the attack on the basis that granting the habeas writ in this case permits circumvention of Teague v. Lane, 489 U.S. 288 (1989), Allen v. Hardy, 478 U.S. 255 (1986) and Griffith v. Kentucky, 479 U.S. 314 (1987). Petitioner refuses to understand that this is not a retroactivity case. Further, Petitioner does not state what costs involved under Allen et al. would be involved in this case. A defendant similarly situated to Batson should not be denied application of the rule Griffith v. Kentucky, 479 US at 323. Had counsel's professional duties been properly performed, Respondent's petition would either have been before the court or pending at the time of the Batson case.

There can be no substantial concern that the decision in this unique case "would seriously disrupt the administration of justice." Allen, 478 U.S. at 260. The Allen court expressed deep concern about the task imposed on a prosecutor to produce, many years after the event, evidence of neutral reasons for the exercise of the peremptory challenge. That is not a concern here inasmuch as no evidentiary hearing is necessary. The prosecutor volunteered his purposefully discriminatory reasons on the record. In that regard, this is an even stronger case than Batson.

In the universe of cases in which there may have been discrimination in jury selection prior to the Batson decision, it there is a very low probability that another case like the present one exists. Batson's trial was in February 1984, Respondent's in March 1984. In both cases, defense counsel properly raised the jury selection issue. In Respondent's case the prosecutor admitted his purposefully discriminatory use of peremptory strikes. No such admission appears in Batson and this Court remanded for an evidentiary hearing. Batson's conviction was affirmed in the state court on December 20, 1984, Respondent's, eighteen days later on January 7, 1985. Petitioner's time to file a certiorari petition, had counsel's failure not barred that route, would have expired eighteen days later than Batson's.

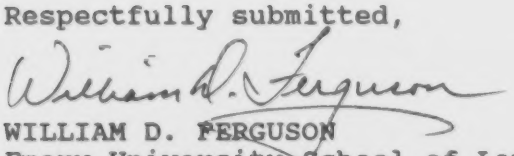
This is a unique case that is factually distinguishable from other cases involving this issue. No issues of national importance are involved because of the factual nature of the case. These unique facts limit the decision of the court below to this case and

no other. Any claims of a serious adverse affect upon judicial administration are not well founded. There is no reason to fear the decision below will permit circumvention of any decision of this Court. Indeed, a contrary decision would drastically reduce the constitutional right of an accused to appellate counsel who perform their duties in an effective manner.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



WILLIAM D. FERGUSON
Emory University School of Law
Atlanta, Georgia 30322-2770
(404) 727-6837

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CERTIFICATE OF SERVICE

I, William D. Ferguson, a member of the Bar of this Court, do hereby certify that on this 31st day of December, 1992, one copy of the Motion for Leave to Proceed in Forma Pauperis and one copy of Respondent's Brief in Opposition in the above-entitled matter were mailed, first class postage prepaid, to Paula K. Smith, Assistant Attorney General, Counsel of Record for Petitioner, 132 State Judicial Building, 40 Capitol Square, S. W., Atlanta, Georgia 30334. I further certify that all parties to be served have been served.

William D. Ferguson

WILLIAM D. FERGUSON
Emory University School of Law
Atlanta, Georgia 30322-2770
(404) 727-6837
Counsel for Respondent